Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1588

FORD MOTOR CREDIT COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FORD MOTOR CREDIT COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Fort Motor Credit Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

There is no written opinion by the district court. The opinion of the court of appeals (Appendix A, *infra*, pp. A-1 - 3) is reported at 476 F. 2d 960, and its opinion on petition for rehearing and petition for rehearing en banc, which is not yet reported, is set forth in Appendix B, *infra*, pp. A-4 - 7).

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1973, and its order denying the petition for rehearing en banc was entered on March 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

1) Whether the United States has the statutory power under the forfeiture and remission statutes, 49 U.S.C. §§ 781, 782, and 19 U.S.C. § 1618, to forfeit an innocent lien-holder's interest in an automobile.

2) If the federal forfeiture and remission statutes permit forfeiture of an innocent party's interest, whether the statutes permit a taking of property without just compensation and without due process of law and are accordingly unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Fifth Amendment of the United States Constitution state:

> No person . . .shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Section 781 of 49 U.S.C. in pertinent part states:

> (a) It shall be unlawful . . . (3) to use any . . . vehicle . . . to facilitate the transportation . . . of any contraband article.
>
> (b) As used in this section, the term "contraband article" means . . . (3) any . . . counterfeit coin or obligation of the United States. . . .

49 U.S.C. § 782 in pertinent part states as follows:

> Any . . . vehicle . . . which has been . . . used in violation of any provision of Section 781 of this title . . . shall be seized and forfeited. . . .

The federal remission statute, 19 U.S.C. § 1618 provides in pertinent part:

> Whenever any person interested in any . . . vehicle . . . seized under the provisions of this chapter . . . files with the Secretary of the Treasury . . . a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. . . .

STATEMENT

On July 15, 1971, Frank Bedford Green bought a used 1969 Plymouth Fury automobile from Myers Courtesy Ford, Inc., in Dallas. The purchase was financed through Ford Motor Credit Company (FMCC) which obtained a security interest in the automobile. Mr. Green made a $100 down payment and did not make any further payments pursuant to his loan agreement.

Subsequently, on August 14, 1971, Mr. Green was arrested by the U.S. Secret Service and charged with possession and

concealment of 985 counterfeit Federal Reserve notes, in violation of 18 U.S.C. § 472. The automobile had been unlawfully used by Mr. Green to transport the counterfeit notes, and it was accordingly at the time of the arrest seized by the Secret Service agents acting pursuant to 31 C.F.R. Sec. 401.1-401.3 and 49 U.S.C. §§ 781, 782 (R. 3; 476 F. 2d 960).[1] Mr. Green was later convicted of violating 18 U.S.C. § 472.

After receiving notification of the seizure FMCC petitioned the Government for remission of the forfeiture and on November 16, 1971, was advised only that "the petition is denied." (R. 4) It is uncontroverted that Mr. Green was the registered title holder of the automobile at the time it was seized, that he unlawfully used it to transport contraband in violation of 49 U.S.C. § 781, and that

> "The total outstanding amount of FMCC's lien interest in the subject automobile exceeds the value of the automobile." (R. 4)

On May 2, 1972, the Government filed this lawsuit in accordance with 19 U.S.C. § 1608 seeking a judgment of forfeiture under 49 U.S.C. § 782. FMCC intervened in the action pleading facts establishing its lien interest and praying for possession of the automobile, remission of the forfeiture, and foreclosure of its security interest. The Government then moved for summary judgment and in support of its motion filed an affidavit and supporting exhibits establishing Frank Green's

[1] The facts set forth in this statement are based upon the Agreed Statement on Appeal filed with the court of appeals under F.R.A.P. Rule 10(d) as the separately bound appendix, and the "R" references are to the appendix. In the lower courts this lawsuit was styled *United States v. One 1969 Plymouth Fury Automobile.*

unlawful use of the automobile (R. 2). In opposition to the motion, FMCC filed the affidavit of its employee, Frank Boswell, who stated that he was the person responsible for verifying Green's credit application, that he had determined that Green had properly repaid an earlier auto purchase loan, that the Retail Merchant's Association in Dallas had no record of Green's credit activities, and that at the time he investigated (and ultimately approved) Green's credit he had no knowledge that Green was either a poor credit risk or had a criminal reputation (R. 4). In addition, FMCC submitted the affidavit of Rodney Robinson, its collection coordinator, who also described the investigation of Green's loan application and stated that the credit references revealed no suspicious evidence to warrant further investigation of Green's credit reputation and that FMCC was never aware nor had any knowledge at any time during its investigation that Green had a criminal record or reputation or was a commercially unreliable person. (R. 5)[2] FMCC alleged and contended that it was an innocent party not guilty of any violation of law and not alleged to have committed any negligent or otherwise wrongful act, and that notwithstanding Green's illegal use of the Plymouth the forfeiture of FMCC's lien interest was a taking of property without due process of law under the Fifth Amendment, and a denial of due process and equal protection because of the discriminatory application of the forfeiture penalty under 49 U.S.C. § 782. (R. 3) On August 3, 1972, the district court granted the Government's motion and entered summary

[2] There is, in fact, nothing in the record to suggest that at the time of the automobile purchase and financing Green indeed had a criminal reputation or record or was a poor credit risk or commercially unreliable.

judgment reciting the elements of F.R.C.P. Rule 56 and granting the forfeiture.

The court of appeals affirmed the judgment, holding that forfeiture of the rights of an innocent lien holder was permitted under the forfeiture and remission statutes, that the Fifth Circuit's prior opinion in *United States v. One 1970 Buick Riviera,* 463 F. 2d 1168 (1972), *cert denied,* 409 U.S. 980, was controlling, and that *United States v. United States Coin and Currency,* 401 U.S. 715 (1971) "was inapplicable." (476 F. 2d 960, 961; Appendix A, *infra,* p. A-3). The court of appeals did, however, observe that it would be incongruous to treat an innocent lienor differently from an innocent record owner of a vehicle, and that in any event "It may even be said that the forfeiture is an anachronistic relic of deodand." (476 F. 2d 960, 961; Appendix A, *infra,* p. A-2).

FMCC petitioned for rehearing and for rehearing en banc, both of which were denied in a brief order citing *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). Judge Wisdom, joined by five other members of the court, dissented on the merits and on the denial of the rehearing en banc. He discussed the *Coin* and *Pearson* cases and concluded that "in all forfeitures there is a *statutory* requirement that the party sustaining the penalty be guilty of some form of fault, intentional or negligent," and that this case raised the questions of the Government's "statutory or constitutional power to impose a penalty on an innocent party." Finally, he observed that the Government's rationale that "The vehicle is condemned as the offender" was

> "barbaric, a vestigal relic of deodand. It is anomalous to treat an innocent lien-holder as harshly as the criminal owner of the automobile." (Appendix B, *infra,* p. A-7).

REASONS FOR GRANTING THE WRIT

FMCC submits that the holding of the court below erroneously failed to recognize that the federal forfeiture statutes are constitutionally infirm unless they are construed to require that the property owner be found to have been significantly involved in or aware of the criminal enterprise, or that the owner had failed to reasonably act to prevent the improper use of the property. The court of appeals' application and construction of the forfeiture and remission statutes conflicts with this court's opinions in the *Pearson* and *Coin & Currency* cases, and this lawsuit squarely presents the statutory and constitutional questions discussed in those cases and affords an opportunity to answer important questions remaining unresolved by *Pearson* and to provide guidance to the lower courts.

It should be emphasized that this case is an appeal from a summary judgment, and in its present posture the record furnishes uncontroverted and presumptively correct evidence that FMCC was innocent of any criminal act, had no involvement in Frank Green's counterfeiting activities, had no reason to know of his criminal activities or criminal propensities (if any), and had exercised reasonable and commercially prudent care before extending credit to Green. As Judge Wisdom pointed out in his dissent from the petition for rehearing en banc, the Government's position is not that FMCC failed to establish its innocence and good faith, but that the lienor's innocence or

its reasonable conduct were wholly irrelevant to the Government's forfeiture rights. (Appendix B, *infra,* p. A-7) This reading of the statutes was followed by the lower court.

FMCC's position is that in the *Coin & Currency* case this Court put a judicial gloss on the federal forfeiture statutes so that when they are read with the remission statute, 19 U.S.C. § 1618,

> " . . . it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." 401 U.S. 715, 721-22.

In the absence of this construction, this Court observed, the statutory provisions would present "serious constitutional questions." *Coin,* at 700. This reading of the federal forfeiture statutes was reiterated in the *Pearson* case, which upheld a forfeiture under Puerto Rican statutes which did not contain any remission provisions. The Court though, then stated that:

> "This is not to say, however, that the 'broad sweep' of forfeiture statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions."

and gave as an example of such 'other circumstances'

> "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive." *Pearson,* supra, 416 U.S. at 688.

FMCC urges that this lawsuit presents those 'other circumstances' mentioned in Pearson and that considering the

record before this Court a forfeiture of FMCC's lien interest in the Plymouth is contrary to the statutory requirements imposed by *Coin & Currency* and constitutes a taking of FMCC's property without due process of law and without just compensation.

The issues presented in this petition are of major importance to the conduct of law enforcement activities and to the commercial credit industry, and the facts of this lawsuit raise questions not only as to the constitutionally proper interpretation of the forfeiture statutes, but as to the evidentiary and procedural standards to be followed in the lower courts. Under the remission statute, 19 U.S.C. § 1618, FMCC properly and timely petitioned the Secretary of the Treasury for remission or mitigation of the forfeiture, and then timely appealed the adverse decision by fiiing a bond under 19 U.S.C. § 1608. The Government then filed its forfeiture lawsuit in federal district court and FMCC intervened. At no point has the Government alleged or offered proof that FMCC was anything but an innocent, unaware and non-negligent lender and allegations and evidence as to FMCC's conduct are found only in its own pleadings and affidavits. No summary judgment proof was offered by the Government to controvert FMCC's evidence of its innocent non-negligent conduct, and as pointed out above, the Government's position has been that FMCC's innocence has no bearing at all on the Government's rights to forfeiture.

As Mr. Justice Bradley stated in *Boyd v. United States,* 116 U.S. 616, 634 (1886), forfeiture proceedings "though they

may be civil in form, are in their nature criminal" and subject to the protections of the Fifth Amendment. Under the statutes, though, the burden of proof in a forfeiture lawsuit is on the claimant, provided that the Government first shows probable cause for the institution of the proceeding. 49 U.S.C. § 784, 19 U.S.C. § 1615. Where the claimant is also the accused criminal the probable cause requirement is satisfied when there is "a reasonable ground for belief of guilt." *Carroll v. United States,* 267 U.S. 132 (1925); see *United States v. One 1971 Chevrolet,* 496 F. 2d 210, (5th Cir. 1974). FMCC submits that in this summary judgment proceeding, where the Government has come forward with no pleading or evidence of the claimant's misconduct (negligent or criminal), the granting of the forfeiture has in effect denied FMCC the opportunity to be advised of the nature of any charges of misconduct or negligence on its part and the opportunity to present evidence in defense of its property interest, and further places the entire burden of proof on the claimant and none at all on the Government. The anomalous result is that the convicted criminal defendant, Frank Green, was afforded a full panoply of federal constitutional rights, see *Boyd v. United States, supra;* while Ford Motor Credit Company is denied these protections. In the court below Judge Wisdom, in dissent,[3] remarked that "It is anomalous to treat an innocent lien-holder as harshly as the criminal owner of the automobile," (Appendix B., p. A-7) and FMCC submits that the procedural and evidentiary burden cast

[3] Judge Wisdom, it should be noted, was a member of the original unanimous panel of the court of appeals in the proceedings below, 476 F.2d 960.

on the innocent lien-holder is not only anomalous, but is a denial of due process of law.

Neither this Court in *Pearson* or Judge Wisdom in his dissent in this case discussed the extent of the duty imposed on the owner or lienor to prevent misuse of the property. The scope of this duty raises serious questions for lending institutions throughout the United States.

FMCC filed affidavits in the district court describing its credit investigation of Frank Green and there is no suggestion that this investigation was inadequate or was otherwise negligently conducted, or that Frank Green in fact had any criminal record or reputation that could have been discovered. Nevertheless, what if Green was found to be reasonably creditworthy, but to also have a prior record of criminal convictions, or of criminal arrests? Would the extension of credit in those circumstances justify a finding that FMCC failed to exercise reasonable care to prevent the subsequent transportation of contraband in the financed automobile? And what if the prior convictions or arrests involved offenses or allegations unrelated to Green's later counterfeiting activities?[4] Did FMCC have a duty to reasonably determine Green's specific criminal propensities before extending credit to him? And perhaps more serious is the question of whether FMCC would be subject to any civil liabilities if it regularly denied credit

[4] Many arrests and convictions may not only be unreliable indicators of a propensity toward criminal conduct or criminal use of a vehicle, but may also be constitutionally suspect. See, e.g., *Papachristou v. City of Jacksonville,* 405 U.S. 156, 169, note 15 (1972).

to persons with past records of convictions or arrests.[5] Further, a widespread denial by consumer finance agencies of the extension of credit to persons with past criminal records would be directly contrary to state and federal programs designed to rehabilitate persons convicted of crimes, reduce recidivism, and make it possible for convicted persons to eventually lead productive lives. If, as FMCC urges, this petition for certiorari is granted, and the judgment of the court below is reversed, the district court will presumably then be in a position to hear further evidence relating to the nature of FMCC's credit investigation[6] and petitioner accordingly suggests that it would in that event be appropriate for this Court to further define the standards by which its conduct is to be judged. A statutory policy designed to induce owners, lessors and lenders "to exercise greater care in transferring possession of their property," *Pearson, supra,* 416 U.S. at 688, is defeated (and the harsh penalty of forfeiture will indeed serve no legitimate purpose and be unduly oppressive) if the innocent owner or lienor has no prior notice of the standards of care applied in the forfeiture proceeding or if — as in this lawsuit — the forfeiture is imposed without *any* finding of fault or negligence.

The forfeiture of FMCC's interest in the Plymouth automobile purchased by Frank Green was contrary to the statutory standards imposed by this Court in the *Pearson* and *Coin*

[5] Consideration of arrest records in connection with employment applications has been held to be a denial of equal employment opportunity to black persons. See *United States v. City of Chicago,* 385 F. Supp. 543 (N.D. Ill. 1975); *Gregory v. Litton Systems, Inc.,* 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified,* 472 F.2d 631 (9th Cir. 1972).

[6] FMCC presumes that there is no question about its lack of involvement in or awareness of Frank Green's counterfeiting activities.

& Currency cases. Without that "statutory gloss" the forfeiture renders the statutes subject to constitutional attack. Because of the importance of the questions raised by this lawsuit FMCC's petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

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PROOF OF SERVICE

I hereby certify that on this 16 day of June, 1975, three copies of the petition for writ of certiorari were mailed, postage prepaid, to Frank McCown, Esq., United States Attorney for the Northern District of Texas, 1100 Commerce Street, Dallas, Texas 75202, counsel for the respondent, and to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Michael Lowenberg

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

ONE 1969 PLYMOUTH FURY AUTOMOBILE,
SERIAL NO. PM43G9D199088,
Defendant.

Ford Motor Credit Company,
Intervenor-Appellant.

No. 72-2844.

United States Court of Appeals,
Fifth Circuit.

April 19, 1973.

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM:

Ford Motor Credit Company (FMCC) appeals from a summary judgment forfeiting title and possession of a 1969 Plymouth Fury automobile to the United States. The record owner was charged and convicted of using the automobile for the unlawful transportation of counterfeit federal reserve notes. 49 U.S.C. §§ 781, 782, The owner had paid $100 down; FMCC's security interest exceeded the value of the car. We affirm.

FMCC contends that: (1) the forfeiture provisions found in 49 U.S.C. §§ 781, 782 were unconstitutionally applied; (2) the forfeiture statutes found in 49 U.S.C. §§ 781, 782 are unconstitutional on their face because they authorize deprivation of property without due process of law and the taking of prop-

erty from a totally innocent party without just compensation; and (3) 49 U.S.C. § 782 is so discriminatory that it violates due process of law.

These are serious contentions well-briefed and well-argued by counsel for FMCC. There is, of course, a distinction between a title-holder and the holder of a security-interest; a company financing the purchase of automobiles knows that it runs the risk of having its interest forfeited, if the car is used to transport contraband. On the other hand, it is incongruous that an innocent lienor whose equitable interest may far exceed the owner's interest is in a worse position than an innocent record owner. It may even be said that the forfeiture is an anachronistic relic of deodand.

If this were a case of first impression, we would examine closely and weigh carefully the competing values in the opposing arguments. But we are bound by decisions of this Court too numerous to cite upholding such forfeitures. FMCC argues, however, that in United States v. United States Coin and Currency, 1971, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434, the Supreme Court took a new look at forfeitures and interpreted the statute as applicable only when the owner has "significantly participated in the criminal enterprise." The Court said

> "The Government contends that the guilt of the owner of the money is irrelevant. . . . If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different meaning."

In that case an owner, not a lienor was involved, a difference that arguably is a significant distinction. In United States v. One 1970 Buick Riviera, 5 Cir. 1972, 463 F. 2d 1168, the contentions were similar to those raised here. This Court rejected the due process and just compensation arguments and, importantly, concluded that United States v. United States Coin and Currency was inapplicable.

We note also that 19 U.S.C. § 1618 allows remission or mitigation of the penalty at the discretion of the Secretary of the Treasury:

> "[T]he Secretary of the Treasury, if he finds that such fine, penalty or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, . . ."

Here FMCC took advantage of this provision but was unsuccessful in convincing the Secretary of the Treasury that he should remit or mitigate the forfeiture of the Plymouth Fury to the extent of its lien interest in the automobile.

The judgment must be affirmed.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

ONE 1969 PLYMOUTH FURY AUTOMOBILE,
SERIAL NO. PM43G9D199088,
Defendant.

Ford Motor Credit Company,
Intervenor-Appellant.

United States Court of Appeals,
Fifth Circuit.

March 20, 1975.

Appeal from the United States District Court for the Northern District of Texas; Joe Ewing Estes, Judge.

ON PETITION FOR HEHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 19, 1973, 5 Cir., 1973, 476 F. 2d 960).

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

GOLDBERG, Circuit Judge, took no part in the decision on the petition for rehearing en banc.

WISDOM, Circuit Judge, with whom BROWN, Chief Judge, and AINSWORTH, DYER, CLARK and GEE, Circuit Judges, join, dissenting.

I respectfully dissent both on the merits and on the Court's failure to grant a rehearing en banc.

In this case the record owner of the automobile was charged and convicted of using it to transport counterfeit federal reserve notes. 49 U.S.C. §§ 781, 782. The owner had made a down payment of only $100. Ford Motor Credit Company's (F.M.C.C.'s) security interest far exceeded this amount.

FMCC's position is that the United States Supreme Court in United States v. United States Coin and Currency, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971), has put a judicial gloss on the federal forfeiture statutes so that when they are interpreted with 19 U.S.C. § 1618

> " . . . [I]t is manifest that they [the forfeiture statutes] are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *Coin* at 721-22, 91 S. Ct. at 1045.

The Supreme Court has recently reiterated its holding in *Coin* in Calero-Toledo v. Pearson Yacht Leasing Company, 1974, 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452.

In *Pearson,* a yacht was forfeited under the Puerto Rico forfeiture statutes. The owner of the yacht challenged the statutes as unconstitutional, relying on *Coin.* The Supreme

Court held that the Puerto Rico forfeiture statutes were constitutional; however, it drew a distinction between the Puerto Rican statutes and the federal statutes. The Supreme Court reiterated its holding in *Coin* that the federal forfeiture statutes must be read with federal remission statute, 19 U.S.C. § 1618, which requires forfeiture only from persons "significantly involved in criminal enterprise," and pointed out that no similar remission statute exists in the Puerto Rican forfeiture statutes to protect innocent owners. Consequently, the harsh pre-*Coin* cases denying innocent owners relief from various forfeiture statutes were held to be applicable to Puerto Rico's remissionless forfeiture statutes.

The Court in *Pearson* stated:

> "This is not to say, however, that the 'broad sweep' of forfeiture statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions. Chief Justice Marshal intimated as much over a century and a half ago in observing that 'a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forfeiture may be employed.' (citation deleted). It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. (citations deleted). Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive." (citations deleted). *Pearson,* supra, 416 U.S. at 688, 94 S. Ct. at 2094.

I read *Coin* as holding that in all forfeitures there is a

statutory requirement that the party sustaining the penalty be guilty of some form of fault, intentional or negligent. The appellant pitches its argument entirely on constitutional grounds. Here the Government conceded that the Company was not at fault. What is involved is the question of the Government's statutory or constitutional power to impose a penalty on an innocent party. It offends me that an innocent person who is the constructive owner and indeed is the owner of almost all of the equitable interest in the car, has his property forfeited for the acts of another person.

The theory underlying the forfeiture is stated in the Government's brief, as follows:

> 'That claimants of vehicles seized under the provisions of 47 [49] U.S.C. §§ 781 and 782, are not entitled to relief from forfeiture by reason of their good faith or innocence is well established. The claimant, in order to prevent or preclude the forfeiture of the vehicle, must establish the vehicle's innocence, and the good faith or innocence of the claimant of said vehicle, in respect of the offense with which the vehicle is concerned, is immaterial. The vehicle is condemned as the offender and becomes subject to seizure upon its use in violation of the express provisions of the statute."

This rationale is barbaric, a vestigial relic of deodand. It is anomalous to treat an innocent lien-holder as harshly as the criminal owner of the automobile. *Coin* and *Pearson* throw new light on the subject of forfeitures and allow inferior courts to reexamine the subject without doing violence to the long line of pre-*Coin* cases upholding the Government's position.

I would reverse.

No. 74-1588

In the Supreme Court of the United States

OCTOBER TERM, 1975

FORD MOTOR CREDIT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1588

FORD MOTOR CREDIT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, which holds a lien on a car, contends that the forfeiture of the automobile deprived it of property without due process of law or just compensation because it was not connected with the acts that precipitated the forfeiture.

On July 15, 1971, Frank Green bought a used 1969 Plymouth Fury automobile. Petitioner financed the purchase and retained a security interest. One month later, Green was arrested and charged with possession of counterfeit Federal Reserve notes, in violation of 18 U.S.C. 472. The automobile, which had been used by Green to transport the notes, was seized by the Secret Service for forfeiture. See 49 U.S.C. 781, 782 and 31 C.F.R. 401.1-401.3. Green was convicted as charged.

Petitioner was notified of the seizure and filed a petition for remission, pursuant to 19 U.S.C. 1618. The petition was denied.

On May 2, 1972, the government filed its complaint in the United States District Court for the Northern District of Texas, in accordance with 19 U.S.C. 1608, seeking a judgment of forfeiture under 49 U.S.C. 782. Petitioner intervened and sought possession of the automobile, remission of the forfeiture, and foreclosure of its security interest. The government moved for summary judgment; petitioner responded with affidavits setting forth the nature of the credit check its employees had obtained on Green. The affidavits asserted that petitioner had taken no part in Green's activities and had no reason to believe that Green had engaged or would engage in illegal activities. The district court entered summary judgment granting the forfeiture.

The court of appeals declined to hold 49 U.S.C. 781 and 782 unconstitutional on their face or as applied in this case and affirmed the judgment (Pet. App. A-1 to A-3; 476 F.2d 960). The court remarked that 19 U.S.C. 1618 permitted petitioner to seek remission of the forfeiture. Over the dissent of six judges, the court declined to rehear the case *en banc* (Pet. App. A-4 to A-7).

1. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, holds that statutory forfeiture schemes constitutionally can apply to the property interests of those not involved in the forfeiting act. "[T]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property" (*id.* at 687-688).

The Court did observe that it would be difficult to reject the constitutional claim of "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property" (*id.* at 689). But the Court went on (*id.* at 689-690, n. 27):

> Since 1790 the Federal Government has applied the ameliorative policy—first adopted in England, see *United States* v. *Morris*, 10 Wheat. 246-295 (1825)—of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred "without willful negligence" or an intent to commit the offense. See 1 Stat. 122, c.12 (1790); 1 Stat. 506 (1797); Rev. Stat. §§5292-5293 (1874); 19 U.S.C. §1618; *The Laura*, 114 U.S. 411, 414-415 (1885); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721 (1971). Indeed, forfeitures incurred under 21 U.S.C. §881(a), which served as the model for enactment of the disputed Puerto Rican statute, see n. 25, *supra*, are subject to the remission and mitigation procedures of 19 U.S.C. §1618. See 21 U.S.C. §881(d). Regulations implementing §1618 provide that, if the seized property was in the possession of another who was responsible for the act which resulted in the seizure, the petitioner must produce evidence explaining the manner in which the other person acquired possession and showing that, prior to parting with the property, he did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 C.F.R. §171.13(a). These provisions are also extended to those individuals holding chattel mortgages or conditional sales contracts. 19 C.F.R. §171.13(b).

The remission statute and regulations apply with full force to petitioner's case. Congress has not provided that an innocent lien holder is without remedy. Petitioner seeks to present the ultimate constitutional issue of the taking of its property only because its petition for remission or mitigation was denied. But once such remission

procedures are available, there is no occasion for this Court to decide petitioner's constitutional argument unless petitioner has established that the remission regulations offer inadequate or illusory protection to its interests. We submit that petitioner has not carried that burden.[1]

Petitioner's sole claim in the court of appeals was that the statutes are unconstitutional on their face because they could deprive one who did not participate in or know of the criminal enterprise of his property. Indeed, petitioner specifically stipulated on appeal that this was the only question presented by the case (Court of Appeals Appendix, p. 5).[2] Petitioner did not claim that it fell within the statutory exception warranting mitigation or remission of the forfeiture. While this case was pending on petition for rehearing, petitioner, in a letter dated July 3, 1974, called *Calero-Toledo* to the court's attention and once more observed that the question whether petitioner qualified for an exception to the forfeiture statutes was not before the court, suggesting a remand to address that question. In short, petitioner never argued that its petition for remission was not properly denied. It therefore has not laid the groundwork for the constitutional issue it now seeks to present; it has not shown that the remission statute is inadequate.

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[1]The government stipulated in the court of appeals that there was no evidence that petitioner bore any culpability for the counterfeiting. That concession is not dispositive of this case, for *Calero-Toledo* also observed that forfeiture could induce lien holders to take "greater care." Cf. *United States* v. *Park*, No. 74-215, decided June 9, 1975.

[2]Petitioner's brief in the district court (p. 1) characterized petitioner's contention as:

> It is Ford Motor Credit Company's position that under the United States Constitution the forfeiture statute, 49 U.S.C. §781-72 [*sic*], should not be made applicable to the innocent lienholder, who had no knowledge that its automobile would be used for the illegal purposes.

2. Because petitioner did not challenge the Attorney General's action not to remit or mitigate the forfeiture, the record in the district court is skimpy. We nevertheless believe that it is significant to the disposition of this case to observe that whenever a petition for mitigation or remission is filed, the Customs Agency Service, a division of the United States Bureau of Customs, is required to conduct a thorough fact-finding investigation to determine whether any allegedly non-negligent petitioner, prior to parting with the property, did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 C.F.R. 171.13(a) and (b). If the "innocent" party has done all it reasonably could have done, the regulations provide for remission. We have no reason to believe that the investigation was not carried out here.

The investigating agent's only method of making the determination required by the regulations in a case of this sort is to determine how well petitioner's employees checked the credit references Green gave to petitioner. According to the affidavits submitted by petitioner to the district court, Green gave three credit references. Of these three references, petitioner determined that Green had completed payments of a $560 loan to his second credit reference, Spain Auto Sales, Hawn Freeway, Dallas. However, the third (a Sears, Roebuck & Co. store in Dallas) reported that Green had no credit record "for lack of an account number." The affiants apparently did not (or made no attempt to) contact the first credit reference, "Smith Furniture Company, 2d Avenue, Dallas." The Retail Merchants Association of Dallas, through which petitioner also made a credit reliability check on Green, had no record of Green's credit activities. (Boswell affidavit, p. 2.) It would have been reasonable for the Customs Agency Service and the Attorney General to conclude from these facts that petitioner's efforts were not so complete that they should have been rewarded with remission.

3. Finally, we note that although the car has been forfeited to the United States, petitioner has a right to full payment from Green. Petitioner's security interest in the vehicle was simply one method of attempting to increase the probability that petitioner would recover its investment. Under the retail installment contract between petitioner and Green (Appendix to Plaintiff's brief in the district court) neither Green's default nor the forfeiture terminated Green's obligation to pay the price. Petitioner has not alleged that it has been unable to recover the price; if Green were to satisfy that obligation (voluntarily or pursuant to litigation), petitioner would suffer no loss because of the forfeiture. The major impact of the forfeiture is not on petitioner but on Green, unless Green violates his contract with petitioner. As between the United States and Green, petitioner should look first to Green for satisfaction. The government surely is entitled to withhold remission if Green pays (or has paid) petitioner, lest petitioner obtain a double recovery. It may be—although we cannot tell on the record of this case—that remission was denied simply because petitioner did not demonstrate that it had made adequate efforts, but had been unable, to collect from its debtor.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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